DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

KOHL'S DEPT. STORES, INC., Petitioner Employer, NEW HAMPSHIRE INSURANCE AND SEDGWICK CMS, Petitioner Carrier, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, LORRAINE IRVING, Respondent Employee.	No. 1 CA-IC 10-0083 DEPARTMENT B **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Special Action – Industrial Commission

ICA Claim No. 20092-450325

Carrier Claim No. 30090819682-0001

Administrative Law Judge Joseph L. Moore

AWARD AFFIRMED

Jardine, Baker, Hickman & Houston, P.L.L.C. Phoenix
By Scott H. Houston
Douglas H. Fitch
Attorneys for Petitioners Employer and Carrier

Andrew Wade, Chief Counsel Phoenix
The Industrial Commission of Arizona
Attorney for Respondent

Law Offices of Chris T. Johnson, P.C. Phoenix
By Janell Dianne Youtsey
Attorneys for Respondent Employee

S W A N N, Judge

¶1 In this special action, we review the Industrial Commission of Arizona's ("ICA") finding that it lacked jurisdiction to consider (on the employer's request) a workers' compensation claim made by an employee ("Respondent") of Kohl's Department Stores, Inc. ("Kohl's"). The claims administrator and the insurance carrier for Kohl's ("Petitioners") filed a notice of claim status ("NCS") that accepted Respondent's claim for benefits. Ninety days after that NCS, Petitioners filed a request for a hearing to challenge the claim's compensability. The ICA found that the NCS had become final and that Respondent's benefits claim was res judicata.

¶2 Petitioners ask us to decide whether a hearing request is an appropriate method for a carrier to challenge its own NCS. We address only that question because it is dispositive of this case. Because we hold that a request for hearing is not a proper method for a carrier to challenge its own NCS, we affirm the ICA's finding.

FACTS AND PROCEDURAL HISTORY

¶3 On July 27, 2009, Respondent, an employee of Kohl's, slipped and injured her foot at work. She filed a workers' compensation claim and a medical report that diagnosed a second

metatarsal fracture in her foot. On September 22, 2009, Petitioners issued an NCS that denied the claim.[1]

¶4 Several months later, on December 1, 2009, Petitioners issued a second NCS that accepted Respondent's benefits claim. The NCS contained language notifying Respondent that the NCS would become final if she did not file a request for a hearing within 90 days of the issuance of the NCS.

¶5 On March 1, 2010 -- 90 days after the second NCS issued -- Petitioners filed a request for a hearing. Petitioners used a preprinted request form that contained a section for specifying the subject matter of the hearing. Petitioners filled out the form as follows:

> ☐ **Notice of Claim Status dated**: _____
> **or** MONTH/DAY/YEAR
>
> **XX Notice, Award, Order or Decision by the Industrial Commission of Arizona dated:** 12-1-09[2]
> **or** MONTH/DAY/YEAR
>
> ☐ **A.R.S. § 23-1061(J) or ☐ Other:** _____

Immediately under the last checkbox, the form required the applicant to "[s]tate [the] reason for the request." Petitioners wrote: "The claim is not compensable."

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[1] As an explanation, this NCS only included the phrase "pending investigation."

[2] No action was taken by the ICA on December 1, 2009, the date that Petitioners issued an NCS accepting Respondent's claim.

¶6 Claimant raised the affirmative defense of res judicata. She argued that the December 1, 2009 NCS that accepted her claim had become final because no subsequent NCS denying that claim had been timely issued. Petitioners responded that the finality of the December 1, 2009 NCS was prevented by their March 1, 2010 request for a hearing.

¶7 Claimant and two witnesses -- her daughter and a coworker -- gave testimony at an ICA hearing. Both parties filed post-hearing memoranda. After hearing the evidence and the arguments, the Administrative Law Judge ("ALJ") found that Petitioners' March 1, 2010 hearing request did not prevent the December 1, 2009 NCS from becoming final. Petitioners requested a review of the finding, which the ALJ granted. Following his review, the ALJ affirmed his finding. Petitioners brought this special action.

STANDARD OF REVIEW

¶8 This court has jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(2), 23-951(A) and Ariz. R. P. Spec. Act. 10. We review deferentially the factual findings of the ICA, but review its legal conclusions de novo. *PFS v. Indus. Comm'n*, 191 Ariz. 274, 277, 955 P.2d 30, 33 (App. 1997). In the absence of a factual dispute, this court reviews a challenge to the finality of a notice de novo. *Asarco, Inc. v. Indus. Comm'n*, 204 Ariz. 118, 120, ¶ 7, 60 P.3d 258, 260 (App. 2003).

DISCUSSION

¶9 On appeal, Petitioners argue that the ALJ erred in finding that the ICA lacked the jurisdiction to consider the March 1, 2010 request because of the finality of the December 1, 2009 NCS.

¶10 The Arizona workers' compensation system is designed to allow carriers to make benefits determinations that are then subject to the claimant's right to request a hearing. *See* A.R.S. § 23-1061(F); *Nelson v. Indus. Comm'n*, 115 Ariz. 293, 295, 564 P.2d 1260, 1262 (App. 1977). Those determinations are communicated to claimants in an NCS, which is the ICA form that carriers and self-insuring employers use to notify claimants about the acceptance or denial of benefits claims, the amount of benefits, and the termination of benefits. *See* A.R.S. § 23-1061(F); Arizona Administrative Code ("A.A.C.") R20-5-106.A.4, -118.A.

¶11 The ICA can review the subject matter of an NCS if a hearing is timely requested. *See* A.R.S. § 23-947(A); *Holmes Tuttle Broadway Ford v. Indus. Comm'n*, 27 Ariz. 128, 131, 551 P.2d 577, 580 (App. 1976). A request is timely if it comes within the 90 days after the NCS is issued; after those 90 days, res judicata principles take effect under A.R.S. § 23–947 and the NCS becomes final and binding. *Church of Jesus Christ of Latter Day Saints v. Indus. Comm'n*, 150 Ariz. 495, 498, 724 P.2d 581, 584 (App. 1986).

¶12 Within the 90 days before the NCS becomes res judicata, a carrier can freely change the NCS as long as it uses the proper method. *Id.* As this court recognized in *Latter Day Saints*,

> the practices of the [ICA] are to allow a carrier to unilaterally rescind or amend a previously issued [NCS] within the 90 day statutory period. Thus, both the claimant and the carrier may void the binding effect of [an NCS] within this time frame -- the claimant by filing a request for hearing and the carrier by simply issuing a new [NCS].

Id.

¶13 Petitioners argue that the decision in *Latter Day Saints* is distinguishable and that the above-quoted language does not govern this case. They concede in their opening brief that the *Latter Day Saints* method, i.e., simply issuing a new NCS, "may be the only method to unilaterally rescind a Notice of Claim Status." But they assert that "it is not the exclusive method whereby an 'interested party' may *challenge* a notice of claim status issued on a workers' compensation claim." That assertion depends for its force on the premise that the March 1, 2010 hearing request "was not intended to rescind the earlier acceptance of the claim; it was intended to challenge the compensability of the claim." Petitioners argue that as "interested parties" they were entitled to a hearing to make that challenge.

¶14 While we agree that Petitioners are interested parties,[3] we nevertheless hold that *Latter Day Saints* governs Petitioners' case. When Petitioners filed the March 1, 2010 request-for-a-hearing form, they gave as the reason for the request: "The claim is not compensable." If Petitioners no longer believed that Respondent's claim was compensable, then they must have also believed that the December 1, 2009 NCS that accepted the claim was substantially in error. The proper method for a carrier to correct an erroneous NCS is to issue a new one. By not "simply issuing a new [NCS]," Petitioner seems to have made a mistake. That mistake cannot be corrected by means of an ICA hearing to "challenge" Petitioners' own decision. The ICA hearing is a means of settling controversies between adverse parties -- not a method for unilateral correction of error.

[3] For purposes of workers' compensation, the term "interested parties" includes the employer, the employee, the commission, the insurance carrier or their representative. A.R.S. § 23-901(10).

CONCLUSION

¶15 The ALJ correctly found that the December 1, 2009 NCS had become final and res judicata. Therefore, we affirm the ALJ's order in his Decision upon Review of December 3, 2010, which in turn affirmed the original order in the Decision upon Hearing and Jurisdiction of October 18, 2010. *See* Ariz. R. P. Spec. Act. 10(k).

/s/
_____
PETER B. SWANN, Judge

CONCURRING:

/s/
_____
MARGARET H. DOWNIE, Presiding Judge

/s/
_____
DONN KESSLER, Judge